No. 79-6777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY KEITH STEAGALD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR PETITIONER

JOHN RICHARD YOUNG
Suite 504
44 Broad Street, N.W.
Atlanta, Georgia 30303

Court-appointed counsel for Petitioner

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QUESTION PRESENTED FOR REVIEW

I. **Whether The Fourth Amendment To The United States Constitution Requires Law Enforcement Officers Armed With An Arrest Warrant, But In The Absence Of Exigent Circumstances, To Obtain A Search Warrant To Enter The Premises Of A Third Party, *Not* Named In The Arrest Warrant, In Order To Effectuate The Arrest.**

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States* v. *Gaultney*, No. 78-5329, and *United States* v. *Steagald*, No. 78-5416, 606, F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, Petition for Rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980), as set out hereafter at J.A. 20 — 37.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1980. On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980, an extension of time within which to petition for certiorari. The Petition for Certiorari was docketed in the Supreme Court of the United States on June 13, 1980. The Writ of Certiorari was granted on October 6, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV (as set out in Petition for Certiorari, Appendix B, page 1).

RULES INVOLVED

Rule 4 of the Federal Rules of Criminal Procedure (as set out in Petition for Certiorari, Appendix C, page 1).

Rule 41 of the Federal Rules of Criminal Procedure (as set out in Petition for Certiorari, Appendix C, page 2).

STATEMENT OF THE CASE

This criminal action was brought under a three count indictment (the Petitioner being named in Counts One and Two only) charging the Petitioner with possession with intent to distribute a quantity of cocaine (a Scheduled II controlled substance), in violation of 21 United States Code 841(a)(1) in Count One, and conspiracy to violate 21 United States Code 841(a)(1) in violation of 21 United States Code 846 in Count Two. Also charged in Counts One and Two were Cathy Gaultney, Hoyt Gaultney and James Albert Smith. Additionally, Hoyt Gaultney was charged in the same indictment with importation of the same cocaine in violation of 21 United States Code 952(c) in Count Three (J.A. 3 — 5).

Hoyt Gaultney was convicted following a jury trial before the Honorable Charles A. Moye, United States District Court Judge for the Northern District of Georgia, on all three counts in a separate and previous trial. His conviction was affirmed in *United States* v. *Gaultney*, 606 F.2d 540 (5th Cir. 1979), Petition for Panel Rehearing granted in part and denied in part, 615 F.2d 642 (5th Cir. 1980) (J.A. 20 — 37). Cathy Gaultney and James Albert Smith were tried subsequently with Petitioner, and each of them prevailed on Motions for Judgment of Acquittal at the close of the government's case in chief. (Tr. 276). Petitioner's Motion for Judgment of Acquittal at the close of the government's case was denied (Tr. 276) and upon renewal of his Motion at the close of all the evidence, the Court denied the Motion again (Tr. 282).

Finally, Petitioner filed a renewal of his Motion for Judgment of Acquittal following the jury's verdict of guilty on both counts (R. 100). On June 12, 1978, Petitioner's Renewal of his Motion for Judgment of Acquittal was denied by the court (R. 108).

On June 27, 1978, Petitioner was sentenced by Judge Moye to five years on Count One and five years on Count two to be followed by a special parole term of three years, with the sentence in Count Two to run concurrently with the sentence in Count One (R. 112). And, on the same date, Steagald filed his Notice of Appeal and the Court granted his Motion to Proceed in Forma Pauperis. (R. 113).

Gaultney's and Petitioner's cases were appealed separately but were joined for oral argument and were jointly decided by a panel of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court, citing the Fifth Circuit's opinion in *United States* v. *Cravero*, 545 F.2d 406, *cert. den.*, 430 U.S. 983 (1976). Judge Kravitch dissented, saying that "Unlike *Cravero* the evidence linking the subject [of the arrest warrant] to the premises was extremely fragile and insufficient to justify as entry without a search warrant." On April 14, 1980, the same panel, in a per curium opinion, granted in part and denied in part the Petition for Panel Rehearing, and denied the Petition for Rehearing En Banc. 615 F.2d 645 (1980). (J.A. 35 — 37) Judge Kravitch again dissented on the issue of probable cause and continued that "The more important problem, however, is the extension of the rule announced in

United States v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), a rule of questionable validity and wisdom even in the less egregious circumstances present in that case. Expansion of this rule constitutes a disturbing erosion of the Fourth Amendment rights of third parties. " at 644. (J.A. 37).

On May 13, 1980, Mr. Justice Powell signed an Order granting until June 13, 1980, an extension of time within which to petition for certiorari. The Petition for Certiorari was docketed in the Supreme Court of the United States on June 13, 1980. The Writ of Certiorari was granted on October 6, 1980. (J.A. 39).

On November 3, 1980, the motion of Petitioner for appointment of counsel was granted, and an Order was entered appointing John Richard Young, Esquire, of Atlanta, Georgia, to serve as counsel for the Petitioner in this case.

STATEMENT OF FACTS

On January 4, 1978, Agent Joseph Rassey of the Drug Enforcement Administration was contacted by an individual who had provided him with information concerning drug cases in the past. This individual (hereafter referred to as C.I.) told Agent Rassey that he might be able to locate Ricky Lyons, a federal fugitive, and a guy named "Jimmy" who he believed was a state fugitive. Lyons had been indicted by a federal grand jury in the Southern District of Georgia, and a warrant for his arrest dated July 14, 1977, was issued. (1st Supp. Vol. I, P. 14). He further told Agent Rassey that Jimmy had some cocaine to sell (1st Supp. Vol. II, p. 43). Initially

Agent Rassey was interested in the C.I. setting up the drug deal but subsequently he contacted Agent Kelly Goodowens in Savannah, Georgia, and relayed the information he had obtained from the C.I.

On January 14, 1978, the C.I. called Rassey and said he had "received a phone call from Jimmy and that it was a number where Jimmy and Ricky were going to be within the next twenty-four hours" (1st Supp. Vol. II, p. 36). Rassey was unable to reach Goodowens that day and waited until Monday, January 16, 1978, to relay the phone number he had obtained to Goodowens. Rassey said that he spoke with the C.I. just prior to reaching Goodowens on the 16th and the C.I. told him the number was still good (1st Supp. Vol. II. p. 38). Rassey testified that he did not inquire of the C.I. as to what his basis was for concluding that Jimmy was calling from the particular number he had. Rassey accepted the C.I.'s conclusion because "he had always given me good information before. He said he knew they were there." (1st Supp. Vol. II, p. 50). The C.I. was unable to say from what location specifically Ricky Lyons or Jimmy was calling or how long they would be there. Rassey testified that it was his impression "from what he said was that they were just going to be there for a while; they did not live there". (1st Supp. Vol. II, P. 47). The C.I. also told Rassey that there would be four or five people at the residence. When asked about the basis of his belief in this statement, the C.I. replied, "Well, I just know that there's you know, some people there" (1st Supp. Vol. II, p. 48). Rassey spoke with the C.I. several

times by telephone on January 18, 1978, and relayed to Goodowens that the C.I. said the information was "still good" (1st Supp. Vol. II, p. 49).

On January 16, 1978, after Goodowens received a telephone number from Agent Rassey, he contacted Southern Bell's Security Division and obtained the address for the telephone number. He learned that the phone was listed in the name of Richard E. Fisher (1st Supp. Vol. I, p. 18-19). On January 18, 1978, after having difficulty locating the address, Goodowens contacted Southern Bell again and obtained detailed directions on how to get to the residence (1st Supp. Vol. I, p. 10). At no time on these days did Goodowens attempt to reach Mr. Fisher though he had determined that Mr. Fisher was located in the directory, along with another residence phone (1st Supp. Vol. I, p. 112).

On January 18, 1978, based on the information he obtained from Rassey, Goodowens decided to go to the Carey Court location in an attempt to find Lyons. Despite the fact that he was in the federal courthouse in Atlanta when he received the final call from Rassey, no search warrant was obtained (1st Supp. Vol. I, p. 79, 86-87). Goodowens testified that physically he could have obtained a search warrant; there was "no physical hinderance" (1st Supp. Vol. I, p. 87). Goodowens also had received information from Rassey that there would possibly be drugs at the residence (1st Supp. Vol. I, p. 39, 88). However, Gwinnett County Detective Fowler stated it a bit more strongly in his testimony when he testified that DEA Agent Smith "had previously told me

that he had information that there might be a quantity of majijuana at the location" (1st Supp. Vol. II, p. 107). And "to the best of my recollection I believe he stated 1500 pounds" (1st Supp. Vol. II, p. 108).

Agent Smith called in several other agents to accompany himself and Goodowens. None of the officers had any photographs of Lyons (1st Supp. Vol. I, p. 46) nor did they have a copy of the arrest warrant (1st Supp. Vol. I, p. 45, 46). Since none of the officers had ever even seen the arrest warrant (1st Supp. Vol. I, p. 47), they apparently were relying on Goodowens' knowledge of the 18 month old indictment (1st Supp. Vol. I, p. 45). Only Agent Smith had testified that he knew Ricky Lyons by sight, and he mistakenly though that Gaultney was Lyons at their first encounter (1st Supp. Vol. II, p. 55).

Altogether there were nine or ten officers, some of whom had requested to come along, comprising the raid squad. All of the officers were in plain clothes and unmarked cars (1st Supp. Vol. I, p. 59). They conducted no surveillance of the residence, though they did drive by and notice that smoke was coming out of the chimney of one of the two houses at the Carey Court location (1st Supp. Vol. I, p. 61).

As the officers approached the house, guns drawn, two male individuals were seen standing at the rear of a Volkswagen. The individuals were Gaultney and Steagald. Gaultney was squatting down at the rear deck of the car. As Smith approached the car he "reached down and grabbed him and picked him up., or almost

picked him up, and said 'Ricky' " (1st Supp. Vol. II, p. 55). In response to why he had done that, Smith testified ". . . at first I thought he was Ricky Lyons; it looked like him to me" (1st Supp. Vol. II, p.55). When Agent Smith decided that this individual was not Lyons, he "turned him around and faced him toward the car" (1st Supp. Vol. II, p. 56). Both men were frisked right there in the driveway in plain view of the public road and identification was demanded of each of them.

Meanwhile, three other agents, including Agent Jim Williams, who arrived in a separate vehicle, headed for the A-frame (the second residence bearing the same address). These agents also approached this residence with their guns drawn. Agent Williams testified, "The purpose of going to the A-frame was the same as going to the house at the top of the hill. We didn't know which house that the individuals might have been at" (1st Supp. Vol. III, p. 17). When it became apparent that the other house was not occupied, Williams returned to the driveway where Gaultney and Steagald were being detained. Williams testified that he thought he "left one officer down there" at the A-frame (1st Supp. Vol. III, p. 17).

After deciding that Gaultney was not Lyons, Agent Smith and another officer, Detective Conway, ran down to the house and demanded entry of Gaultney's wife, Cathy, who had come to the door (1st Supp. Vol. III, p. 51-55). Agent Smith testified that he was dressed in blue jeans with a badge clipped to the pocket of his denim shirt (1st Supp. Vol. II, p. 56); he also had his gun

drawn. Agent Smith described himself as being 34 years old, six feet six and a half inches tall and weighing 270 pounds. He also testified that Mrs. Gaultney looked to be "about five foot four inches or five foot five inches, weigh[ing] less than 100 pounds, right at 100 pounds." He further stated that "the first time I saw her, frankly, I thought she was about 12 or 13" (1st Supp. Vol. II, p.72). Smith told Mrs. Gaultney that he had a warrant for Ricky Lyons. She also correctly identified the two men outside as he husband and Gary Steagald and told Smith that she was "here by myself" (1st Supp. Vol. II, p. 77). Smith told her to "put her hands on the wall and don't move" (1st Supp. Vol. II, p. 77). Cathy Gaultney testified that Smith placed his gun in her back while she was faced to the wall (1st Supp. Vol. III, p. 56). Agent Smith then left her with Detective Conway guarding her while he searched the rest of the house. It was his testimony that she was not free to leave until "I got through searching the house. . . " (1st Supp. Vol. II, p. 77).

As Agent Smith proceeded through the house, he went into the front bedroom and observed a small table with a set of scales and a bag of white power on it (1st Supp. Vol. II, p. 60). Smith testified that there were two beds in the room and that he "looked under the first bed, looked over the second bed, checked it. . . " (1st Supp. Vol. II, p. 60).

Smith left the front bedroom, checked the second bedroom and then returned to the main room and informed Detective Conway that he thought he had seen

cocaine in the bedroom and that "We need to get our act together" (1st Supp. Vol. II, p. 62). Then he went outside and related this to the other agents. Goodowens suggested that Smith drive to Atlanta and assist in getting a search warrant for the house (1st Supp. Vol. II, p. 63-64).

Petitioner was handcuffed as soon as he was taken into the house, after he had furnished the officers with all his identification. Agent Williams testified that he did not know why Steagald was being held in custody (1st Supp. Vol. III, p. 20).

Gaultney indicated to Williams that he wished to talk with him and was taken into the back bedroom. Agent Goodowens testified that he conducted a weapon search of the bedroom for Agent Williams' protection. This search involved looking around a small dressing table, opening drawers, and removing a closed suitcase from a closet shelf which he opened and in which he saw what he believed to be packets of suspected cocaine (1st Supp. Vol. I, p. 37-38). Goodowens placed the suitcase at the other side of the room. At this point Agent Williams was alone with Gaultney.

During this time, Agent Smith had appeared before Magistrate Forrester in the hearing room at the Magistrate's Court and obtained a search warrant. There is some dispute as to the time of its issuance as Agent Smith does not believe that it was 8:00 P.M. when Judge Forrester signed the warrant as is so indicated on the warrant. Magistrate Forrester testified at the Motion to Suppress hearing that his recollection as the time was not

specific. There was a large wall clock in the room where the warrant was signed (1st Supp. Vol. II, p. 33). He did feel that it probably was earlier than 8:00 p.m. but admitted that the authorization was in his own handwriting and he filled in the time "8:00 p.m." (1st Supp. Vol. II, p. 25, 31-32). Agent Smith stated that he went immediately to a phone and called Agent Durrell at the house and relayed to him that a search warrant had been obtained. Agent Smith left the courthouse with the search warrant, stopped for something to eat, and arrived back at the house after 9:00 p.m.

While Agent Smith was talking to Agent Durrell on the phone, James Smith and his wife drove up to the house. Upon entering the house both were met at gunpoint. Agent Goodowens stepped forward with a shotgun and advised he was a federal agent and ordered them both to put their hands on the wall (1st Supp. Vol. I, p. 104). Smith was searched, taken into custody, handcuffed and then taken into the living room with the other defendants. His wife, though no charges were made against her, was placed on the coach with the others. Goodowens testified that she would not have been allowed to leave (1st Supp. Vol. I, p. 108).

Agent Goodowens went to defendant Smith's truck and looked inside to see if there were any other persons in it. Determining that there were not, he returned inside (1st Supp. Vol. I, p. 108).

The search of the premises allegedly pursuant to the serach warrant was conducted before 8:00 p.m., some 10 to 15 minutes after the agents received word from Agent

Smith that the search warrant was in his possession. Subsequently several items were seized, including another suitcase containing suspected cocaine (1st Supp. Vol. I, p. 93).

Agent Smith testified that he arrived back at the house sometime after 9:00 p.m., and about one-half hour to 45 minutes later went out to Smith's Dodge truck and began searching it. He looked through papers and other items on the front floorboard and subsequently found a closed briefcase with a combination lock on it. Agent Smith took the case into the house and went through it (1st Supp. Vol. II, p. 93-94). During this time Defendant Smith was still handcuffed and being held inside the house. He did not consent to the search of the truck (1st Supp. Vol. II, p. 94). Agent Smith said he searched the vehicle to obtain evidence of Defendant Smith's identity (1st Supp. Vol. II, p. 69-70, 93-101, 109). Evidence taken from Smith's truck was suppressed by the district court below.

Each of the individuals, with the exception of Smith's wife, was arrested and shortly thereafter indicted on charges relating to the cocaine seized in the search of the house. Additional warrants were later obtained for a warehouse in Gwinnett County and one in Fulton County and residences in DeKalb and Clayton Counties and various items seized. It is Petitioner's contention that these searches were "fruits of the poisonous tree" as it is uncontested that they flowed from the initial search of the house.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the Constitution of the United States protects an individual's reasonable expectation of privacy from government intrusion. Nowhere is this expectation greater than in the interest of the individual in the sanctity and security of his own home. Therefore, the Amendment commands that a neutral and detached magistrate approve a request by government officials to invade that privacy prior to an entry into the individual's home. Only in certain well-delineated circumstances narrowly drawn in order to give effect to the commands of the Fourth Amendment, may the government agents, based upon probable cause, enter an individual's home without first securing a search warrant.

In view of the Amendment's concern with the expectation of privacy, especially when it relates to the sanctity of an individual's home, prior judicial approval for an entry into a house is required, whether the government seeks entry to search for tangible objects or for persons. The express language of the Amendment speaks of protection against unreasonable searches and seizures in relation to "persons, houses, papers and effects" without distinguishing between the objects of the search or seizure. Moreover, the Warrant Clause specifically requires a particular description of the place to be searched in addition to an equally specific description of any persons or objects intended to be seized. Consequently, if the focus of the Fourth Amendment is in part to scrutinize the narrow right of the government to make entries into homes, then it is irrelevant to the

inquiry of the legitimacy of the entry, whether the entry was for a search for persons or a search for objects.

In addition, this Court's rationale for its holding in *Payton* v. *New York*, requiring an arrest warrant to enter a suspect's home to arrest him, logically supports a requirement for the particular protection provided by a search warrant when the entry to arrest a suspect occurs at a residence of an individual not named in the arrest warrant. The issuance of the arrest warrant is irrelevant to the Fourth Amendment interests of the third person that are guaranteed by the Amendment.

Therefore, the entry by the government in the instant case, without a search warrant and without any recognized exception to the search warrant requirement, was unlawful, and the products of the search should have been excluded from evidence at Petitioner's trial below.

ARGUMENT

I. In Order To Effectuate The Fourth Amendment's Protection Of An Individual's Expectation Of Privacy, Police Must Secure A Search Warrant Before Executing An Arrest Warrant At The Residence Of A Third Party, Not Named In The Arrest Warrant, In The Absence Of Exigent Circumstances.

A. The Fourth Amendment requires a search warrant before law enforcement officials may intrude upon one's expectation of privacy, except in the case of well defined exceptions.

The United States Supreme Court has consistently held that the Fourth Amendment dictates that searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978). As the amendment proscribes all unreasonable searches and seizures, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971), "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *Michigan* v. *Tyler*, 3436 U.S. 499, 506 (1978).

Logically, this requirement ensures the continued sanctity of the amendment's underlying purpose of protecting an individual's reasonable expectation of privacy, as set forth in *Katz*. Therefore, this Court has held that:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948).

Not only does this prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure, *United States* v. *Martinex-Fuente* 428 U.S. 543, 565 (1976), citing *United States* v. *Watson*, 423 U.S. 411, 455-456, n. 22(1976) (Marshall, J. dissenting), but it also guards against erosion of the basic precepts of a democratic society. The classic statement of this purpose embodies the rationale of the Court's preference for

judicially approved warrants. As stated by Justice Jackson in *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948):

> "The point of the Fourth Amendment which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of fereting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the peoples' homes decure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officier, not by a policeman or government enforcement agent."

Moreover, while the amendment's proscriptions are deemed to protect people, not places, *Katz*, *supra*, the private homes of individuals have always evoked the need for heightened protection. In *Stone* v. *Powell*, 428 U.S. 465 (1976), the Court concluded that "the Amend-

ment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect the 'sanctity of a man's home and the privacies of life from searches under unchecked general authority." (Citations and note omitted). In addition, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). Only last term this Court held that it is a " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable". *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 CrL 3033, 3036 (1980). The Payton Court merely reaffirmed previous Supreme Court holdings. *Agnello* v. *United States*, 269 U.S. 20, 32 (1925) ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws".); *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970) (" 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant' ", citing *Agnello* v. *United States*, 269 U.S. at 33).

In the case at bar, the Drug Enforcement Administration officials had no warrant to search the Carey Court residence. The existence of an arrest warrant does not provide the Fourth Amendment protection to the third party's expectation of privacy in his own home mandated by the Fourth Amendment and court precedent. *Payton*, *supra*. More important, the government

agents cannot justify their warrantless entry into Petitioner's home by any recognized exigent circumstance which will obviate the need for a search warrant. The exceptions include: (a) a search incident to and *following* a lawful arrest, *Chimel* v. *California*, 395 U.S. 752 (1969); (b) a search of a vehicle with probable cause, *Carroll* v. *United States*, 267 U.S. 132 (1975); (c) a consent search, *Johnson* v. *United States*, 333 U.S. 10 (1948); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); (d) a search with probable cause for and in hot pursuit of a fleeing and dangerous felony suspect, *Warden* v. *Hayden*, 387 U.S. 294 (1967); (e) a search of abandoned real estate or personal property, *Abel* v. *United States*, 362 U.S. 217 (1960); (f) a search under urgent necessity, *United States* v. *Barone*, 330 F.2d 543 (2nd Cir. 1964), *cert. denied*, 377 U.S. 1004 (1964); (g) a search pursuant to custodial prerogative, *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); (h) a search with probable cause, necessary to prevent loss or destruction of the thing to be seized, *United States* v. *Barone, supra*; *Johnson* v. *United States, supra*; and (i) a search in which evidence is encountered inadvertently, in plain view, when the officers are lawfully on the premises, *Coolidge* v. *New Hampshire, supra*.

In addition, there is recognized a "general exigency" exception which requires an analysis of several factors to determine whether there "is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *United States* v. *Adams*, 621 F.2d 41,44 (1st Cir. 1980). In *Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970), the court

found sufficient exigency to affirm the denial of suppression of certain stolen goods seized upon the warrantless, unconsented, nonforceable entry into an armed robber's home. The entry occurred after police obtained eyewitness identification of Dorman and at a time when no magistrate was readily available. 435 F.2d at 387-388. Among the factors enumerated were: (a) the violent character of the offense; (b) the existence of a reasonable belief that the suspect was armed; (c) the clear showing of probable cause that the suspect had committed the crime alleged; (d) the presence of strong reason to believe the suspect was on the premises; (e) the likelihood that the suspect would escape if not swiftly apprehended; and (f) the fact that the entry, though not consented to, was nevertheless made peaceably.

Thus, the contrast between *Dorman*, *supra*, and the case at bar is stark. Here, the offense for which the suspect was sought was non-violent. There existed no reasonable belief that the suspect was armed. Any belief that the suspect was still on the premises was less than strong. The entry was not only non-consentual, but was lacking in peaceableness as well, being effectuated by numerous officers armed with shotguns and brandished pistols. And, there was no showing of any increased danger to the community or the officers that made the bypass of a detached judicial officer imperative. Indeed, the officers had ample time and opportunity to seek a search warrant from a magistrate, a course of action that would have been consistent both with effective law

enforcement and with the expectation of privacy so understandably valued in a democratic society. Instead, they chose to perform the magistrate's job for him.

Moreover, while there was an outstanding arrest warrant for the suspect Lyons, the agents did not possess it at the time of the raid, and only one agent allegedly knew Lyons by sight. Although for purposes of this petition probable cause of Lyons' presence at the house is assumed, one circuit judge below entertained strong doubts. *United States* v. *Gaultney*, 615 F.2d 642, 644 (5th Cir. 1980) (Kravitch, J., dissenting). Importantly, there was no urgency for the raid, the agents having had for *two days* the relevant information that the suspect allegedly would be at the house "for a while". Nor was there any evidence of impending flight.

Significantly, this Court, in interpreting the stringency of the warrant requirements, has not expanded the exceptions to the warrant necessity beyond these well-delineated boundaries. *Supra*, pg. 15. Therefore, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment". *Mincey* v. *Arizona*, *supra*, 437 U.S. at 393. In *Mincey*, the police attempted to justify an extensive multi-day, warrantless search of defendant's residence following the murder of a police officer as a "murder scene exception". 437 U.S. at 392. In rejecting this theory, the Court stated:

> "The Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally

sacrificed in the name of maximum simplicity in enforcement of the criminal law." 437 U.S. at 393.

Earlier, the Supreme Court had rejected a further exception to Fourth Amendment warrant protections by holding that "there is no dimunition in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately." *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978).

However, in the face of these clear limitations, cases hold that an arrest warrant for a suspect is itself an exception to the search warrant requirement, when the existence of the arrest warrant is used to gain access to the third person's dwelling to effect a search for the suspect. Petitioner contends that these cases deviate from the Amendment's history and purpose. In *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), it was held that "there is good reason to hold the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." Relying on a combination of the "inherent mobility of the suspect", and the magistrate's previous finding of probable cause to believe that the named suspect committed the offense, the court held that these two factors would justify a search for the suspect provided that the police officers reasonably believed he could be found on the premises searched. 379 F.2d at 263.

However, upon further scrutiny of *McKinney's* facts, it becomes apparent that the fugitive was extremely transient, having robbed an Indiana bank, rented a Cleveland apartment, and travelled by auto with appellant to Boston and back. A search warrant was executed at his apartment without result. The FBI also received information about the suspect staying with a few friends of appellant's. Thus, the record demonstrated that this particular fugitive was highly mobile. These facts and the holding suggest that his mobility was viewed by the appellate panel as an exigent circumstance in and of itself, which arguably could then lessen the FBI's duty to obtain search warrants. In fact, the court cited *Johnson* v. *United States*, *supra*, for the proposition that a suspect fleeing or likely to take flight would militate against the necessity of a search warrant. *Ibid.* Therefore, it appears that the holding in *McKinney*, *supra*, turned more on the inherent mobility of this fugitive, than it did upon the novel notion that suspects named in all arrest warrants are inherently highly mobile.

Similarly, in the case *sub judice*, the Fifth Circuit panel specifically followed the previous circuit opinion of *United States* v. *Cravero*, 545 F.2d 406 (5th Cir. 1976), rehearing and rehearing en banc denied, 545 F.2d 420 (5th Cir. 1977). *United States* v. *Gaultney*, 606 F.2d 540, 544 (5th Cir. 1979), petition for rehearing granted in part and denied in part, petition for rehearing en banc denied, 615 F.2d 642 (5th Cir. 1980). The latter *Cravero* panel reversed the former, holding that the arrest war-

rant was an express exception to the search warrant requirement.

> "The law of this circuit . . . is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. (Cites omitted). **** Reasonable belief embodies the same standards of reasonableness [as probable cause] but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate *and without exigent circumstances*. 545 F.2d at 421. (Note and citations omitted) (Emphasis supplied).

Accord, United States v. *Harper*, 550 F.2d 610 (10th Cir. 1977); *United States* v. *Brown*, 467 F.2d 419 (D.C. Cir. 1972); *Commonwealth* v. *Terebieniec*, 408 A.2d 1120 (Sup. Ct. Pa. 1979).

Petitioner contends that *Cravero* and its progeny create numerous constitutional errors of analysis and misapply to the specific facts of their cases the general principles therein enunciated. In regard to the latter claim, the rule in *Cravero* paints with too broad a brush. *Cravero* allows police officers to ignore the absence of exigent circumstances and to substitute their judgment for the magistrate's, even though there existed in *Cravero* exigent circumstances of the very type catalogued in *Dorman*, *supra*. One suspect was heavily armed and had a reputation for violence. *United States* v. *Cravero*, 545 F.2d at 413, n. 13. The agents cut off

surveillance of the house when it became likely that their informant's "cover had been blown." After the agents knocked on the door and announced possession of arrest warrants, they heard someone inside inform the others of the police pressence. 545 F.2d at 413. Cravero was brandishing a pistol and the agents heard noises from a bathroom. Fearing the existence of the violent fugititve, the agents entered the bathroom, finding another defendant and contraband. *Ibid.* These factors are *themselves* exigent circumstances which distinguish Petitioner's case from the circuit's unnecessarily broad and consititutionally infirm general rule. Under this anlysis, the *Cravero* ruling exceeds the scope of its own facts and gravely erodes the fundamental protections of the Fourth Amendment.

Constitutionally, the *Cravero* rule, as applied in Petitioner's case below, violated this court's holding that "only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970). The government has never shown exigency. "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances." *McDonald* v. *United States*, *supra*, 335 U.S. at 454 (cites omitted). Moreover, the authorization for entry into the third person's home which *Cravero* permits circumvents the warrant procedure that is designed to minimize the dangers of the needless physical intrusions by government agents

that the Fourth Amendment was directed against. *See, generally, Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. 3033, 3036 (1980).

In short, the unfettered discretion which *Cravero* places in the hands of government agents armed only with an arrest warrant is made possible only by an implicit rejection (or at least a misreading) of well-reasoned and carefully developed authority in the area of Fourth Amendment law. Such power in the hands of the government is inconsistent with the aims of a free and democratic society.

B. Under the Fourth Amendment, there exists no logical distinction between searches for "persons" and searches for "things".

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The explicit language of the Fourth Amendment, read in light of its history, purpose and judicial application, justifies no logical distinction between police entries to search for "persons" and police entries to search for "things". *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct.1371, _____, 27 Cr.L. 3033, 3036 (1980). Through this amendment, the citizenry is guarded from

"unreasonable searches and seizures" in its "persons, houses, papers and effects." A reading of the final quoted portion comprehends no distinction between "persons" on the one hand and "houses, papers, and effects" on the other. Thus, the purpose and effect of the Fourth Amendment guarantees should apply equally to both categories. By the express terms of the "search and seizure" clause, these categories require the interposition of the judgment of the magistrate between the citizen and the police, so that the prohibition against unreasonable intrusions upon a person's reasonable expectation of privacy, is not abridged. *Katz* v. *United States*, *supra*; *Johnson* v. *United States*, *supra*; *McDonald* v. *United States*, *supra*.

Furthermore, the Amendment, literally read, mandates the issuance of warrants only upon a showing of probable cause, with two additional requirements, namely, particular descriptions of (1) the places to be searched, *and* (2) the persons *or* things to be seized. This unequivocal language not only places persons and things on the same constitutional footing in terms of particularity of description, but would seem to apply to both categories the threshold requirement of particularly describing the place where the warrant shall be executed in order to effect a search *fo.* and seizure of either the person(s) or object(s).

Such a literal construction is consistent with the history, purpose and judicial interpretation of the Amendment. While indiscriminate searches and seizures conducted under the authority of general warrants were

the immediate evils that lead to the Amendment, its final form protected the right to be free from unreasonable searches and seizures and required the warrants issued to be particular and based upon probable cause. The Amendment's history, purpose and interpretation converge into the basic policy of protecting a citizen's reasonable expectation of personal security by interposing between the public and the authorities the shield of the neutral and detached magistrate, who, except in certain circumstances, is charged with the authority to issue search warrants only for a particular place and only after a showing of probable cause.

In *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), this Court, reflecting upon the opinion in *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government and its employe's [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and rummaging of his drawers that constituted the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ."

Therefore, since the language of the Amendment "applies equally to the seizures of persons and to seizures of property," *Payton* v. *New York*, _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. 3033, 3036 (1980), and the purpose of the Amendment is to protect against arbitrary governmental violations of a home, a

judicial determination (except in the certain well-defined circumstances) should control any contemplated entry, regardless of whether what is sought is a person or a thing. Thus, the Supreme Court in *Payton*, *supra*, held that "any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind." The Court continued:

> The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the zone of privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'the right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally established the proposition that 'at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' *Silverman* v. *United States*, 365 U.S. 505, 511. *In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.*

_____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3037 (emphasis supplied). *See*, Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 Stanford L. Rev. 995, 998 (1971)(There appears to be no reason why the constitutional preference for judicial,

rather than police, determination that a named thing is in a named place should not include within its scope the determination that a named person is in a named place); Rotenbert and Tanzer, *Searching for the Person to Be Seized*, 35 Ohio St. L. J., 56, 76 (1974) (No convincing reason why search and seizure procedures do not include search for the person within their protections.)

Petitioner contends that the lack of a logical distinction between searches for persons and searches for things is nowhere clearer than in the situation where the citizen whose guaranteed expectation of privacy is unreasonably invaded is a third person not named in the arrest warrant or a person against whom the evidence sought will not be used. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), it was recognized that:

> In criminal investigations, a warrant to search for recoverable items is reasonable 'only when there is probable cause to believe that they will be uncovered in a particular dwelling.' Search warrants are not directed at persons; they authorize the search of 'places' and the seizure of 'things', and as a constitutional matter they need not even name the person from whom the things will be seized.

436 U.S. at 555 (cite omitted).

Yet, if the subject of the search were a person named in an arrest warrant, valid under *United States* v. *Cravero*, *supra*, regardless of the lack of any exception to the search warrant requirement or the absence of exigent circumstances, the decision to intrude upon the legitimate expectations of privacy of the third person

would be in the sole discretion of the police officers. The arrest warrant would ensure merely that there had been a judicial finding of probable cause that a particular person had committed a particular offense; no judicial consideration of the place in which the arrest is to be made would exist. The effect is to give the police a dangerous degree of freedom in searching for the person and to invite derrogation of Fourth Amendment guarantees. Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, *supra*, at 997.

As one commentator discerned, "A prior judicial determination of the grounds to arrest the person the police believe is therein would primarily protect that person, who is not deemed entitled to such protection when arrested on the street, but would only indirectly protect the person whose premises are intended to be entered." *W. LaFave*, 2 Search and Seizure, §6.1 (1978).

The better view, and the one constitutionally consistent with the Fourth Amendment, is that the warrantless entry of a dwelling to arrest be put on the same constitutional footing as a warrantless entry of a dwelling to search. Entry in both instances is *per se* unreasonable unless "exigent circumstances" justify the failure to obtain a warrant. *United States* v. *Shye*, 492 F.2d 886, 891 (6th Cir. 1974). "Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence." *Rice* v. *Wolff*, 513 F.2d 1280, 1291 (8th Cir. 1975), rev'd on other grounds, sub nom *Stone*

v. *Powell*, 428 U.S. 465 (1976). See, generally, *United States* v. *Prescott*, 581 F.2d 1343, 1349 (9th Cir. 1978). Only then will third parties be guaranteed the same constitutional protection for the security of their home that they receive when the government seeks to seize inanimate objects from their residences.

C. The "*Cravero* rule" is inconsistent with the reaffirmation of Fourth Amendment doctrine in *Payton* v. *New York*, *supra*.

In *Payton*, *supra*, it was held that "for Fourth Amendment purposes an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3041.

In *Payton*, *supra*, the State, which had legislatively authorized its police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest, argued that only a search warrant based upon probable cause to believe the suspect is at home at a given time can adequately protect the suspect's privacy interests that are at stake. Since that requirement was "manifestly impractical", the State insisted that no warrant of any kind was needed.

The response of this Court adds further support for Petitioner's contention that the Fifth Circuit erred in his case, and that in applying *Cravero*, misapplied Fourth Amendment doctrine. The arrest warrant requirement, this Court held in *Payton*, *supra*, while presumably less

protective of the citizen than a search warrant, "nevertheless suffice[s] to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." _____ U.S. _____, 100 S.Ct. 1371, _____, 27 Cr.L. at 3041.

Petitioner's case stands in marked contrast to *Payton* and is even less related to *Cravero*. At the time of the raid by the Drug Enforcement Administration agents, Petitioner was not a fugitive, suspect, or for that matter, even known by the agents to be on the premises. As far as they knew, one of those houses on the Carey Court lot was the residence of a Mr. Fisher. Significantly, as far as the record indicates, no law enforcement officer had been before a magistrate on the Ricky Lyons matter for six months. Clearly there was no interposing of a magistrate between these zealous officers and the citizen in this case. The arrest warrant, directed at Lyons, is as protective of Petitioner's privacy interests as no warrant at all, and therefore this unreasonable intrusion cannot be upheld. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

Additionally, since there were no exigent circumstances in Petitioner's case, the competing governmental interests are outweighed by the sanctity of Petitioner's privacy interests in his home. *Payton* v. *New York*, *supra*, 27 Cr.L. 3033, 3041 (Blackmon, J., con-

curring). Therefore, the lack of protection afforded by the arrest warrant to any person but the suspect himself requires that the police apply to the magistrate to obtain judicial authorization for intruding upon the third person's premises.

The holdings and rationales of *Payton* and *Cravero* are patently inconsistent. A crucial point in the case *sub judice* is that the co-existence of the doctrines of *Payton* and *Cravero* will allow police officers to enter, for example, Petitioner's home to arrest "Payton" based on the exact same determinations that police would utilize to enter Payton's own residence to arrest him. Thus, the result would be the same in either case, despite the total dearth of any relation between Petitioner and the facts which gave rise to the issuance of the arrest warrant for the suspect. The arrest warrant, affording no Fourth Amendment protection to Petitioner, therefore violates the Amendment's prohibition against unwarranted intrusions into a citizen's privacy. *Payton* v. *New York, supra,* 27 Cr.L at 3037, n. 26.

Moreover, *Cravero* makes the citizen's expectation of privacy and security a hollow right. It is true, of course, that the "reasonableness of the officer's judgment is always subject to judicial review". *United States* v. *Cravero, supra*, 545 F.2nd at 421. But when the remedy of unlawful police action is restricted to the citizen's right to go into a court of law to seek redress, as opposed to the additional security provided by the knowledge that the police officer is subject to a *prior* judicial approval, the intrinsic value, if not the substance itself of the Fourth Amendment is nullified.

Furthemore, a *Cravero* arrest warrant would allow police, based on thier own determination of probable cause, to make arrest entries without search warrants, whether or not exigent circumstances existed. However, arrest warrants are not substitutes for search warrants. *Rice* v. *Wolff*, *supra*, 513 F.2d at 1280-1281. *Accord, Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3rd Cir. 1974) ("Although police have warrants for the arrest of suspects, they may enter premises, *at least of third persons,* to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." 502 F.2d at 928 (emphasis supplied)); *Fisher* v. *Volz*, 496 F.2d 333 (3rd Cir. 1974) (Arrest warrant, probable cause, *and* exigent circumstances will allow police to dispense with search warrants.)

Moreover, in *Wallace* v. *King*, 626 F.2d 1157 (4th Cir. 1980), the Court held that not only must police officers have an arrest warrant for the suspect and probable cause to believe that he is on the premises sought to be entered but "there must also exist an appropriate exception to the warrant requirement. . . ." Additionally, the Court recognized that:

> Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient.
>
> * * *
>
> *An arrest warrant indicates only that there is probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect*

is in a stranger's house." (cite omitted) 626 F.2d at 1161 (emphasis supplied)

In conclusion, "when entry into premises other than those of the person to be arrested is contemplated, then surely it is the protection provided by a search warrant rather than an arrest warrant which is most needed." W. LaFave, 2 *Search and Seizure*, §6.1 (1978). To hold otherwise is to abandon the legacy of the Fourth Amendment.

CONCLUSION

WHEREFORE, Petitioner prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that the evidence seized as a result of the unlawful police entry and search be suppressed in conformance with the dictates of the Fourth Amendment.

Respectfully submitted,

JOHN RICHARD YOUNG

Court-appointed Counsel for Petitioner

MARTIN & YOUNG

Attorneys at Law

Suite 504
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 577-2225